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No. 94-1298

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

BARBARA PROPST and FRANKLIN M. PROPST,

Petitioners,

vs.

DONALD L. BITZER, MORTON W. WEIR, JUDITH LIEBMAN, and ROBERT M. BERDAHL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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ALTERNATIVE STATEMENT OF QUESTIONS PRESENTED

1. Whether the District Court and the Court of Appeals erred in allowing a reconsideration by the District Court of the prior denial of summary judgment on the issue of qualified immunity in regard to the University Administrators in the Franklin M. Propst case after the Court of Appeals' decision in the Barbara Propst case deciding the same issue.

2. Whether the District Court and the Court of Appeals erred in granting summary judgment to the University Administrators in the Franklin Propst case on the qualified immunity issue based upon the decision in the Barbara Propst case.

3. Whether the District Court and Court of Appeals erred in granting summary judgment to defendant Bitzer in both cases.

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TO THE HONORABLE SUPREME COURT:

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, which affirmed the judgment of the District Court, is reported at 39 F.3d 148 (7th Cir. 1994). (Pet.App. 1-15).

CORRECTIONS TO PETITIONERS' "STATEMENT OF THE CASE"

The Petitioners' "Statement Of The Case" is inaccurate in numerous respects.

First, it is incorrect that the Propsts were given no substantive responsibilities after their transfer from the University's computer laboratory (CERL). (Pet. For Writ of Cert., p. 3). As stated by the Court of Appeals, Barbara Propst was assigned to the position of Assistant Dean in the College of Applied Life Sciences, and Franklin Propst was returned to his previous position as a tenured professor of physics. Neither transfer resulted in any loss of compensation or rank, and both Propsts received their scheduled salary increases for the 1987-88 academic year. (Seventh Cir. opin. in *B. Propst et al. v. Bitzer et al.*, Pet.App. 4).

Second, there are absolutely no facts in the record that Bitzer launched a campaign to isolate, undermine and discredit the Propsts. (Pet. For Writ of Cert., p. 5). In fact, before the Administrators decided to make their recommendation to transfer the Propsts from CERL, Bitzer was unaware of the allegations of impropriety being made by the Propsts. (Liebman dep. p. 391, Berdahl dep., Vol. I, pp. 244-246). Bitzer did, however, contend that the University investigation was wholly unwarranted and threatened to resign if the disruption in CERL caused by the Propsts' allegations was not rapidly concluded. (Seventh Cir. opin. in *B. Propst et al. v. Bitzer et al.*, Pet.App. 3).

Third, it is erroneous that Bitzer misrepresented to the Propsts that he had been ordered to remove them from their positions. (Pet. for Writ of Cert., p. 5). The

Administrators decided to remove the Propsts from CERL without prior consultation with Bitzer. (B. Propst dep. pp. 211-212, Liebman dep. Vol. I, pp. 384-395). Liebman suggested to Bitzer that he consider removing them from their positions. (Seventh Cir. opin. in *B. Propst et al. v. Bitzer et al.*, Pet.App. 3).

Fourth, there are no facts in the record supporting Dillon Mapother's belief that the Loeb investigation's purpose was to gather evidence to justify the transfer of the Propsts in an effort to appease Bitzer. (Pet. For Writ of Cert., p. 5). Mapother did not point to any specific facts or conversations that supported this theory, and he conceded that he could only speculate as to who may have given Loeb this directive. (Seventh Cir. opin. in *B. Propst et al. v. Bitzer et al.*, Pet.App. 7).

Fifth, it is incorrect that between January and November of 1987 there were no complaints about the Propsts' job performance. (Pet. for Writ of Cert., p. 6). Vice-Chancellor Berdahl was visited by two separate groups of CERL employees, one in the late Spring of 1987 and one in the early Fall of 1987. At the first meeting the CERL employees told Berdahl about the difficulties in moving paper through the business office of CERL, headed by Barbara Propst. A larger group of CERL employees later visited Berdahl. Some of the employees represented that both Propsts were intentionally impeding CERL work. (Defs. SA -134, 135, 152, 153 to Joint Brief of Appellees in Seventh Cir. Ct. of App.). In addition, both Weir and Liebman received numerous reports of low morale at CERL and that research work was behind schedule. Also, Franklin and Barbara admitted that their relationship with Bitzer deteriorated to the point of

affecting their ability to work with him. (Seventh Cir. opin. in *B. Propst et al. v. Bitzer et al.*, Pet.App. 10, 11).

Finally, the University audit did not show all of the allegations alleged by the Propsts to have been accurate. (Pet. for Writ. of Cert., p. 6). The University audit of CERL lasted six months and relied on interviews of CERL employees and other data. The audit absolved Bitzer of any wrongdoing. (Seventh Cir. opin. in *B. Propst et al. v. Bitzer et al.*, Pet.App. 3, 4).

ARGUMENTS FOR DENYING THE PETITION

No special or important reason exists favoring review of the opinion below. In addition, the Court of Appeals' decision does not conflict with the decision of another Court of Appeals. Furthermore, the case involves a consistent application of existing precedent to a qualified immunity and First Amendment balancing test issue. Finally, as to the University Administrators, the certiorari petition is filed only on behalf of Franklin Propst, and this Court previously denied certiorari to review the finding of qualified immunity on the identical claim of his spouse, Barbara Propst. *Elliott v. Thomas*, 937 F.2d 338 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 973 (1992).

I.

THE QUALIFIED IMMUNITY ISSUE WAS DECIDED IN ACCORDANCE WITH WELL ESTABLISHED PRECEDENT

Two of the three alternative questions presented for review involve the propriety of granting of summary judgment to the University Administrators (Weir, Liebman and Berdahl).

Petitioners failed to provide any comment in regard to the fact that on July 15, 1991, in an earlier appeal the Seventh Circuit Court of Appeals found in Barbara Propst's case that the University Administrators were entitled to a summary judgment as a matter of law. *Elliott v. Thomas*, 937 F.2d 338 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 973 (1992) (hereinafter referred to as *"B. Propst I"* (Pet.App. 32-46)). This Court declined to take that case dealing only with the issue of the University Administrators entitlement to qualified immunity as a matter of law in Barbara Propst's case.

The Barbara Propst case and the Franklin Propst case addressed the identical qualified immunity issue as it pertained to the University Administrators. The two cases were based on the same record, and the depositions taken for Franklin's case were used in Barbara's case. *B. Propst I* all but formally reviewed the district court's summary judgment on the issue of qualified immunity in Franklin's case, as the lower court's initial reasoning in Franklin's case had merely been extended without comment to Barbara's case. (Seventh Cir. opin. in *B. Propst et al. v. Bitzer et al.*, Pet.App. 6).

Petitioners commingle the two cases in order to make it erroneously appear that this Court has the authority to review the summary judgment granted to the University Administrators in the earlier Barbara Propst case. (Pet. for Writ. of Cert., p. i, q. 4). But the Seventh Court's decision in 1991 regarding the qualified immunity of the University Administrators as to Barbara Propst is final.

In any event, the decision of the Court of Appeals in *B. Propst I* simply followed the decision of this Court in *Anderson v. Creighton,* 483 U.S. 635 (1987) and stated as follows:

> . . . Yet the question is not what the conditions in the laboratory *were;* it is what the administrators reasonably believed them to have been. (citations omitted). Objectively reasonable but mistaken conclusions do not violate the Constitution. If we assume that the staffers who visited and wrote to the administrators were lying, this does not establish that the administrators' actions were unreasonable, given the information in their possession. Conditions in the Laboratory are not relevant; the inquiry must focus on what the defendants knew, and whether reasonable persons in their position would have believed their actions proper given the state of the law in 1987.

Pet.App. 40, 41.

The Court of Appeals in *B. Propst I* further held that Barbara Propst had not produced "specific, non-conclusionary factual allegations" required by the opinion of this Court in *Siegert v. Gilley,* 500 U.S. 226 (1991) that the University Administrators sought to punish Barbara

Propst because of her speech and disregarded other considerations (Pet.App. 46). The Court then held that, "the state of the law on mixed-motive transfers was in 1987 – and remains – sufficiently ambiguous that the three administrators are entitled to immunity." (Pet.App. 46).

The Court of Appeals' decision below on the qualified immunity issue simply followed the opinion in *B. Propst I* which clearly followed the opinions of this Court in *Anderson v. Creighton,* 483 U.S. 635 (1987) and *Siegert v. Gilley,* 500 U.S. 226 (1991).

The invitation to, once again, address the same issue requested to be addressed in 112 S. Ct. 973 (1992) should, once again, be denied by this Court.

II.

THE BALANCING TEST WAS CORRECTLY APPLIED AS TO BITZER

The Court of Appeals' decision below correctly followed the established precedent in regard to applying the balancing test to the actions of Bitzer. The Court appropriately noted that in *Pickering v. Board of Educ.,* 391 U.S. 563 (1968) and *Connick v. Myers,* 461 U.S. 138 (1983), this Court held that the First Amendment protects public employees from retribution for speech on a matter of public concern provided that the employee's interest in free expression is not "outweighed by any injury the speech could cause to 'the interest of the State', as an employer, in promoting the efficiency of the public services it performs through its employees." (Pet.App. 8 quoting *Pickering*). The Court additionally cited this Court's opinion in *Connick v. Myers,* 461 U.S. 138 (1983)

for the proposition that the proper balance of these competing interests is a question of law. (Pet.App. 9). The Court below held that the Propsts' interest in speaking out must be balanced against the State's interest in the efficient operation of CERL. (Pet.App. 9). The Court goes on to state that the facts regarding disruption were amply illustrated by the record and that there were no material issues of fact regarding the obvious disruption in CERL. (Pet.App. 10, 11). In addition, the court had evidence before it of the Propsts' admission of disruption and reports by employees to the Administrators of low morale and poor productivity.

Indeed, the lower court opinion was simply a mundane application of the balancing test entirely consistent with the opinions of this Court in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983).

III.

WATERS V. CHURCHILL IS CONSISTENT WITH THE OPINION OF THE COURT BELOW

Petitioners primarily contend that the opinion below is inconsistent with this Court's decision in *Waters v. Churchill*, ___ U.S. ___, 114 S.Ct. 1878 (1994). In *Waters*, this Court, in a plurality opinion, held that when there is a dispute about the nature of the speech under the balancing test, the Courts must look to the facts "as the employer reasonably found them to be." 114 S.Ct. 1878.

There is absolutely nothing inconsistent between *Waters* and the opinion below.

First, the *Waters* case does not involve the issue of qualified immunity, and this Court expressly declined to address that issue in that case. 114 S.Ct. at 1891.

Second, unlike *Waters*, there is no factual issue in the instant case as to the nature and content of the Propsts' speech. The matters addressed by the Propsts were clearly enunciated in the voluminous documents and memoranda in the record.

Third, the major issue in *Waters* was whether Churchill's speech was or was not a matter of public concern. Hence, the factual dispute over the content of the actual speech. In the instant case Bitzer conceded from the beginning that the Propsts' speech involved a matter of public concern. (Pet.App. 9).

Fourth, the opinion below appropriately cites *Churchill* in its discussion of the *Pickering, Connick* balancing test. (Pet.App. 8).

Fifth, petitioners interpret *Churchill* as requiring absolute certainty as to the factual conditions in CERL. (Pet. for Writ of Cert., pp. 11, 12). *Churchill,* however, only requires a reasonable belief based upon a reasonable investigation, of which the instant record is replete. The Court notes in this regard as follows:

> . . . it is clear that if petitioners really did believe Perkins-Graham's and Ballew's story, and fired Churchill because of it, they must win. Their belief, based on the investigation they conducted, would have been entirely reasonable. . . . Management can spend only so much of their time on any one employment decision. By the end of the termination process, Hopper, who made the final decision, had the

> word of two trusted employees, the endorsement of those employees' reliability by three hospital managers, and the benefit of a face to face meeting with the employee he fired. With that in hand, a reasonable manager could have concluded that no further time needed to be taken. As respondents themselves point out, "if the belief an employer forms supporting its adverse personnel action is 'reasonable,' an employer has no need to investigate further." . . .

114 S.Ct. at 1890.

Finally, even if one equates a factual issue over the nature of the speech with a factual issue over the nature of the disruption in CERL, the decision to transfer the Propsts clearly met the "reasonableness" test enunciated in *Churchill*. The investigation conducted by the employer in *Churchill* consisted of the administration talking to a few of the individuals who conversed with Churchill. The investigation in the instant case involved a six-month formal independent University audit which found that Bitzer had done nothing wrong. The Propsts were only transferred after the audit results became known – certainly reasonable employer conduct or investigation.

CONCLUSION

This case presents no issue even remotely appropriate or important for this Court's review. The decision below is not in conflict with the decision of any other Court of Appeals nor are there any other special reasons for review. The case is an ordinary case applying qualified immunity to the University Administrators and the

traditional balancing test established by this Court in regard to Bitzer's conduct.

Respondents pray that Petitioners' Petition for Writ of Certiorari be denied.

Respectfully submitted,

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